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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/747,529	12/22/2000	James M. Sheppard JR.	2827	2077
7590 06/08/2009 DOUGHERTY & CLEMENTS & Hofer Suite 300 1901 Roxborough Road Charlotte, NC 28210				
EXAMINER JOHNSON, JENNA LEIGH				
ART UNIT		PAPER NUMBER		
1794				
MAIL DATE		DELIVERY MODE		
06/08/2009		PAPER		

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**BEFORE THE BOARD OF PATENT APPEALS  
AND INTERFERENCES**

Application Number: 09/747,529  
Filing Date: December 22, 2000  
Appellant(s): SHEPPARD, JAMES M.

\_\_\_\_\_  
Gregory N. Clements  
For Appellant

**EXAMINER'S ANSWER**

This is in response to the appeal brief filed March 18, 2009 appealing from the Office action mailed August 5, 2008.

**(1) Real Party in Interest**

A statement identifying by name the real party in interest is contained in the brief.

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**(2) Related Appeals and Interferences**

The following are the related appeals, interferences, and judicial proceedings known to the examiner which may be related to, directly affect or be directly affected by or have a bearing on the Board's decision in the pending appeal:

09/837,094

10/314,794

**(3) Status of Claims**

The statement of the status of claims contained in the brief is incorrect. A correct statement of the status of the claims is as follows:

This appeal involves claims 21, 22, 24 - 30, and 32 - 36.

**(4) Status of Amendments After Final**

The appellant's statement of the status of amendments after final rejection contained in the brief is correct.

**(5) Summary of Claimed Subject Matter**

The summary of claimed subject matter contained in the brief is correct.

**(6) Grounds of Rejection to be Reviewed on Appeal**

The appellant's statement of the grounds of rejection to be reviewed on appeal is correct.

**(7) Claims Appendix**

The copy of the appealed claims contained in the Appendix to the brief is correct.

**(8) Evidence Relied Upon**

3,669,818	Stark	6-1970
3,721,273	Sherrill et al.	3-1973
2,163,769	Terrasse	5-1937

**(9) Grounds of Rejection**

The following ground(s) of rejection are applicable to the appealed claims:

I. Claims 21, 22, 24 – 27, 29, 30, 32 – 34, and 36 are rejected under 35 U.S.C. 103(a) as being unpatentable over Terrasse in view of Stark.

Terrasse discloses a woven fabric of a reversible pattern of large surface composed of two different colors (column 1, lines 1 – 5). As shown in Figures 1 and 2, the woven fabric has a first face A with a light colored central portion and dark colored, striped border regions on all four edges of the towel and a second face B which has the reversed pattern with a dark colored central regions and a light colored, striped border regions. Terrasse discloses that the light colored yarn is white and the dark color yarn is blue (column 2, lines 45 – 55). Further, Terrasse discloses that the border regions or bands of color can be made any desired length and width so that all types of borders may be formed by using two different colored yarns to produce various combinations (column 4, lines 1 – 13). Terrasse suggests that it would be desired to provide decorations or embellishments to the central area of the fabric (column 4, lines 10 – 13). However, Terrasse fails to teach printing the central region of the fabric.

Stark discloses a pile fabric having a patterned surface and a design superimposed on the patterned surface for use in carpets, towels, and upholstery (abstract). Further, Stark discloses that there is a continuing desire in the textile field to produce new and aesthetically pleasing textile products (column 1, lines 25 – 29). *Various patterns* may be produced in the textile fabric itself by *varying the construction* of the pile surface and *using different color yarns* to create various parts or sections of the fabrics (column 1, lines 29 – 31 and 40 – 45). Further, Stark discloses that it is known in the art to print patterned pile fabrics *in registry* with sections of the existing pattern (column 1, lines 45 – 47). Or, the printed design can be can be printed on the woven pile fabric out of registry with the weave pattern producing a particularly attractive fabric for use in carpets, towels, and the like (column 1, lines 50 – 58). The pile fabric can be produced by conventional means, including weaving, to produce a *desired pattern* in the fabric (column 2, lines 13 – 15). The printing can be applied by various methods including roller printing, screen printing, photographic printing or the like (column 2, lines 22 – 25). And the printed design can include *multiple colors onto fabrics made from different colored yarns* (column 2, lines 23 –

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28). Additionally, the pile yarns can be looped yarns or cut yarns (column 2, lines 29 – 30). When the looped yarns are cut, the process inherently releases tension in the yarn and allows the fibers to spread open to some degree. Finally, Stark discloses that the particular pile pattern used to make the fabric is *virtually unlimited*, as is the print design to be applied to the fabric, and the final product is *governed by the desired visual appearance* (column 2, lines 43 – 47).

Thus, Stark discloses a multi-colored, patterned woven fabric to which a printed design is applied. Further, Stark discloses that the weave pattern and yarn colors can be chosen from an unlimited number of designs based on the desired visual appearance of the end product. Also, the patterned, woven fabric can be printed with various colors and patterns, by known printed methods, to enhance the aesthetics of the product. And the printing can be done in or out of registry with the pattern woven in the fabric.

Hence, it would have been obvious to one having ordinary skill in the art to add a printed design as disclosed by Stark to the patterned fabric taught by Terrasse since Stark teaches that woven patterned fabrics can be enriched by applying a printed pattern to the fabric which enhances the desirability of the end product (Stark, column 2, lines 48 – 50). Additionally, it would have been obvious to one having ordinary skill in the art to choose the location on the lighter colored central area since applying designs to white or light colored backgrounds is well known and commonly done because the design usually stands out best on a light background.

Additionally, claims 21 and 29 recite that the border is *capable* of masking the graphic impression that *may* overlap in the border area. Hence, the claimed product does not positively require that the graphic impression is overlapping with the border. Thus, the prior art only needs to be able to mask a printing color. Additionally, the limitation reciting that the central area on the back of the woven fabric is *capable* of masking *any potential* bleed through only requires that the contrasting color regions would be able to mask the print. Thus, the prior art does not need to produce a fabric where the print overlaps onto the border region or bleeds through to the back of the fabric. Therefore, the claims include

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embodiments where the printed fabric is printed in only the central region of the fabric without overlapping onto the border or bleeding through to the back of the fabric.

Further, both dark and light colors would inherently have the ability to mask dark or light printing colors, respectively, which might overlap onto the border regions, or bleed through onto the back of the fabric to some degree. Thus, claims 21, 22, 24 – 27, 29, 30, 32 – 34, and 36 are rejected.

**II.** Claims 28 and 35 are rejected under 35 U.S.C. 103(a) as being unpatentable over Terrasse and Stark as applied to claims 21 and 29 above, and further in view of Sherrill et al. (3,721,273).

The features of Terrasse and Stark have been set forth in the previous Office Action. Terrasse fails to teach shearing and blossoming the pile fabric. Stark discloses that the woven, patterned fabric can include cut or looped yarns (column 2, lines 29 – 30). Sherrill et al. is drawn to printed pile fabrics. Sherrill et al. discloses that the printed fabric includes a cut pile surface. Further, the cut loops are free to spread out or splay to create a soft, plush surface (column 3, lines 63 - 65). Thus, the cutting (or shearing) process inherently frees the looped fibers in the yarns, allowing the yarns to inherently splay open (or bloom) producing a surface which is more receptive to printing and produces a clearer image than a loop pile surface (column 4, lines 18 - 24). Thus, it would have been obvious to one having ordinary skill in the art to apply the print pattern to a sheared and open cut pile surface, as discussed by Sherrill et al., to produce a soft, plush fabric surface and produce a clearer printed image in the final product. Thus, claims 28 and 35 are rejected.

#### **(10) Response to Argument**

It is noted that the applicant concedes that the claimed weave structure comprising a weave design with a lighter colored central area and darker colored border region on a first side, with the opposite side having a darker colored central area and a lighter colored border region are known (Appeal Brief, page 10). Further, the applicant acknowledges that the use of lighter central regions which are bordered by contrasting darker regions are also well known. Thus, the applicant's arguments are drawn to the functional features recited in the claim "wherein said border on said is capable of masking said

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graphic impression that may overlap onto said border from said central area on said one side, eliminating the need for precise alignment of said graphic impression within said central area of said one side; and wherein said central area on said second side is capable of masking any potential bleed through of said graphic impression from said central area", and what weight should the limitation be given with regards to the final structure of the claimed product and if those features are sufficiently taught or suggested in the prior art.

I. First, the applicant argues that the claim limitations are not given sufficient patentable weight (Appeal Brief, pages 9 - 10 and 13 - 16). Specifically, the limitation with regards to the darker border region and the darker central region masking any potential bleed through or graphic impression that may overlap. As set forth above, the limitation does not positively require the print to overlap or bleed through. Thus, the claims include embodiments where the image is only applied to the central region without any bleed through. Further, the claim language recites that the darker regions are "capable of masking" the printed image. It has been held that the recitation that an element is "capable of" performing a function is not a positive limitation but only requires the ability to so perform. It does not constitute a limitation in any patentable sense. *In re Hutchison*, 69 USPQ 138. Thus, these features are interpreted as only requiring the colors have the ability to mask a color, which all colors would at least be able to mask some other colors.

Additionally, the applicant's argues the fact that a print can be applied without being concerned with proper alignment of the print or worries about creating a high amount of wasted product should be given weight in the product claim (Appeal Brief, pages 12 - 14). First, it is noted as set forth above the claim does include embodiments where the print is only applied to the very center of the central region, without being concerned any overlapping of the print. Also, it is known in the art methods of dealing with bleed through, since printed fabrics are printed on a regular without having bleed through. Second, even though product-by-process claims are limited by and defined by the process, determination of patentability is based on the product itself. The patentability of a product does not depend on its method

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of production. If the product in the product-by-process claim is the same or an obvious variant from a product of the prior art, the claim is unpatentable even though the prior product was made by a different process. *In re Thorpe*, 227 USPQ 964, 966 (Fed. Cir. 1985). The functional language related to the choice of colors and alignment of the graphic during production of the printed towel are drawn to the process of making the towel itself. These features should only be given patentable weight if they were to produce a printed towel which is structurally different than the prior art. Thus, if the prior art product can be produced by a different method, i.e., with precise alignment of the graphic impression that controls bleed through, then the prior art product would still render the claimed product unpatentable. Hence, the claims only positively require a structure with a dark border and lighter central region and a printed image in the central region, wherein the darker border regions have the ability to mask printing.

Therefore, the claim language is broad enough to include embodiments where the central area is printed without any of the print overlapping onto the border or bleeding through to the back of the towel. Hence, if the prior art teaches a woven towel with the claimed lighter and darker border and central regions, which the applicant has acknowledged is known in the art, and the prior art teaches a printed pattern is added only to the central region of the towel, then the prior art would read on the claimed invention, even if the prior art requires special processing to prevent overlap with the border regions and bleed through onto the back of the towel. The different processing limitations would not create a structurally different final product since both the claimed invention and the prior art would produce a printed image in the central portion of a towel with a darker border region and a lighter central region and the inverse colors on the opposite side, which the applicant concedes is a known towel design, without any print overlap or bleed through.

Further, the applicant argues that by controlling the choice of colors, less precise printing can be used to print the fabric, and thus the design feature has a mechanical function. However, the function is related to the processing of the fabric, and not the structure of the final product itself, and is therefore not given patentable weight with regards to the product claims. Nor, does the processing significantly



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distinguish the final product from the products disclosed in the prior art since the final product does not have to have the printed pattern overlap onto the border regions or bleed through to the back of the towel. And while things like bleed through and printing overlapping onto adjacent regions can be undesirable from a visual aspect, it is not always undesired, as shown in Stark. And both products, the applicant's towel and the Terrasse towel that is printed in or out of registry with the woven pattern, would have identical structural features in the final product, i.e., a woven towel with a lighter colored central region and a darker colored border region, with the opposite pattern on the backside of the towel, and a printed graphic image on the lighter central region and possibly the darker border region, with the only possible difference being the colors and images chosen to create the desired visual appearance.

The fact that the final product might have a different visual design due to the combination of colors and whether the printed pattern can or cannot be seen does not create a structurally different printed towel from what is known in the prior art. The colors chosen to create the final design relate to the ornamentation and design of the fabric and do not distinguish over similarly printed woven fabrics. Design matters which relate purely to ornamentation only cannot be relied upon to patentably distinguish the claimed invention from the prior art. *In re Seid*, 161 F.2d 229, 73 USPQ 431 (CCPA 1947). The fact that a border region is chosen to be blue or red, as opposed to black does not structurally distinguish one printed, patterned towel from another printed, patterned towel. And the choice of print colors would also be related to the final visual appearance of the towel and does not change the structural features of the towel. The patentability of a product is due to the structural features of the product and both the prior art and applicant's towel would produce a product with the same structural features.

Additionally, the applicant argues that the claimed invention has more color options (Appeal Brief, page 14) and that the prior art would have more limited color choices (Appeal Brief, page 16). It is unclear how the prior art with a printed pattern applied to a woven fabric more limiting than the applicants own towel produced by similar methods. There is no indication that the printed pattern in the prior art uses less colors than the present invention. But, if the prior art has more limited color choices

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than the wide range of colors which the applicant's invention can use, wouldn't the more numerous color choices of the applicant's invention overlap with the limited color choices that can be used in the prior art?

In the alternative, darker colors inherently have the ability to mask or hide similar and lighter colors to some degree and lighter colors can also mask other colors to some degree. As taught by Terrase the woven towel structure with darker borders and lighter central areas on one side of the fabric, and the opposite pattern on the other side of the fabric are known. In fact, even the applicant concedes that using darker border region with the lighter central region, is a known practice in the art. And the applicant acknowledges that the color combination can be chosen through happenstance from the teachings of the prior art (Appeal Brief filed March 31, 2008, page 10). Therefore, it is a known practice to use darker colors, which would inherently include colors with a high masking ability such as black or dark blues, as the border regions of the woven towel. Thus, the claimed functional features would be inherent to the dark colors used in the prior art, and does not need to be acknowledge by the prior art. It has been held that as long as there is evidence of record establishing inherency, failure of those skilled in the art to contemporaneously recognize an inherent property, function or ingredient of a prior art reference does not preclude a finding of anticipation. *Atlas Powder Co. v. IRECO, Inc.*, 190 F.3d 1342, 1349, 51 USPQ2d 1943, 1948 (Fed. Cir. 1999). As long as the prior art teaches the desired structural feature which would inherently have the claimed function then the inherent function is considered to be present in the prior art, and the claims are not patentable over the prior art. The darker regions would inherently mask to some degree, a graphic impression applied to the central region, since for the graphic image to be clearly visible on the lighter region it would be printed in a contrasting darker color. Therefore, the contrasting darker graphic would be less visible on the darker border. Hence, the darker border inherently masks the graphic impression. And, the darker regions would have this ability whether or not they are printed on by the prior art. Thus, the functional limitation is inherently present in the product of the prior art.

**II.** With regards to the rejection based on Terrasse and Stark, the applicant argues that Stark is drawn to teaching the printed pattern out of registry to produce a highly attractive appearance (Appeal Brief, pages 11 - 13). However, it is noted that the reference is relied on for what it teaches as a whole. And Stark discloses in the background and the discussion of the invention that it is known to print fabrics with woven designs formed therein, and that these printed patterns can be printed either in or out of registry with the printed pattern to create numerous designs and attractive appearances. Thus, the rejection does not rely solely on Stark's invention, but also on Stark's discussion of what other printed products are known in the art, to establish the general knowledge in the relevant art. Further, it is noted that Stark, does not discuss whether the print is visible in all the sections of the printed fabric. In fact, a fabric which comprises different colored background sections, particularly if the sections include a darker section and a lighter section, would inherently include some sections which mask the printed image to some degree, as compared to the other sections.

Further, Stark never specifically defines which combinations of colors or fabric and print patterns are specifically considered visually attractive. And while Stark teaches that products produced by printing graphics out of registry with the woven pattern to have the potential to create highly attractive products, Stark does not state or teach that products printed in registry would not be attractive or that products having woven regions with print and without print would be undesired. Instead, Stark desires to create more combinations of patterns and colors to give manufacturers the ability to create various designs and end products. And Stark discloses that combining printed patterns and woven patterns in various combinations can be used to create various highly visually attractive products. However, which designs are considered attractive and desirable is driven by fashion and styles of the times which change. Thus, while Stark teaches a means to create numerous designs it is within the level of ordinary skill to choose from the various combinations of printed and weave patterns to create a final product which would be considered visual attractive by a consumer. Stark in general teaches combinations of single and multiple colors can be used to create woven and printed patterns that are combined together to create a

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visually attractive end product. Stark does not teach that the printed design must be printed on, and distinguishable in all regions of the patterned fabric. Nor, does Stark teach away from printing in registry or printing with colors that are masked by regions of the woven fabric. The printed region is inherently going to be somewhat hidden or masked in darker colored regions. And, as suggested by Stark these numerous fabric and print color combinations can be chosen by one with ordinary skill in the art to create a desired design in the end product that is visually attractive.

Further, it would have been obvious to one having ordinary skill in the art to have applied graphic images on the lighter central region. With the claimed towel structure, the image can be placed in a limited number of places on the towel, i.e., the dark or light central region and the dark or light border regions. Further, one with skill in the art would choose the place darker images on a contrasting colored regions, i.e., the lighter central region, so that the image can be clearly seen. Further, more colors can be seen on the lighter regions than the darker regions since lighter colors like white would mask very few other colors. Thus, it would have been obvious to one having ordinary skill in the art to place the graphic image on the lighter central region.

**III.** Finally, the applicant has supplied two affidavits to show unobviousness through commercial success, evidence of copying, and long felt need (appeal Brief, 17 - 21). The evidence of commercial success are based on the applicant's sales figures, from 2000 - 2002 of the Edge towels, which were generally described as having the claimed woven structure with a graphic image printed on the towel, and that the graphic image could be printed such that it overlaps onto the border regions. First, it is noted that the towel product was sold in 2000 for the first time and only for part of the year. Thus, it would be expected that the product would grow in sales in 2001 when it is sold for a full year. The applicant states that the invention was able to produce improved graphic towels as compared to towels where the image is woven into the fabric itself, and usually limited to only two colors for the graphic design, due to limitations of weaving the design in the fabric. The improved graphic towels were produced by printing onto a jacquard towel the desired graphic design to produce a finished product with a wide range of colors

and the look of an expensive jacquard woven towel. The affidavit details how being able to print on the woven, jacquard towel has made the towel highly desirable. However, as shown in Stark, it is known to print on high end, woven patterned fabrics, to produce visually attractive final products. Thus, the reason for the success of the product as argued by the applicant. is printing on the patterned, woven towel which has been shown to be known in the art.

As set forth in § MPEP 716.03, the requirements for establishing commercial success are quite particular. The applicant is required to provide a showing that the commercial success is due to the invention as recited in the claims, and the functions and of advantages of the claimed product, and is not a result of other external factors that can influence sales. Also, that the sales figures Gross sales figures do not show commercial success absent evidence as to market share, *Cable Electric Products, Inc. v. Genmark, Inc.*, 770 F.2d 1015, 226 USPQ 881 (Fed. Cir. 1985), or as to the time period during which the product was sold, or as to what sales would normally be expected in the market, *Ex parte Standish*, 10 USPQ2d 1454 (Bd. Pat. App. & Inter. 1988).

However, the sales provided by the applicant and the arguments do not show that the clearly why the product had the disclosed success. First, it is unclear how the sales were influenced by marketing or licensing agreements. The affidavit makes it clear that the towels were displayed at national trade shows. Which the applicant considered to be only minimal marketing (Appeal Brief, page 19). However, it is noted that displaying products at national trade shows is a manner of advertising that reaches thousands of people who tend to work in fields that would specifically desire the products shown at the trade show. Thus, trade shows are a form of advertising that can connect companies with people who are specifically interested in there product. Further, the applicant does not discuss if any other products, or just the Edge towel products were displayed. Finally, it is noted that the applicant provided the Examiner with a 2002 catalog of products for the company which included the Edge towel. And the catalog included an internet site which also listed the companies products. The catalog was given to the Examiner at the interview on November 6, 2002, two weeks prior to the applicant filing the affidavit. Thus, the Edge towel was

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marketed in multiple ways. And again there is no discussion with regards to how the towel was marketed with respect to the other products sold by the company and if there were any licensing agreements for this product as opposed to other similar towel products.

In considering evidence of commercial success, care should be taken to determine that the commercial success alleged is directly derived from the invention claimed, in a marketplace where the consumer is free to choose on the basis of objective principles, and that such success is not the result of heavy promotion or advertising, shift in advertising, consumption by purchasers normally tied to applicant or assignee, or other business events extraneous to the merits of the claimed invention, etc. *In re Mageli*, 470 F.2d 1380, 176 USPQ 305 (CCPA 1973) (conclusory statements or opinions that increased sales were due to the merits of the invention are entitled to little weight); *In re Noznick*, 478 F.2d 1260, 178 USPQ 43 (CCPA 1973). Thus, the burden on the applicant is to show that the alleged commercial success is due to the claimed product and not other market factors. The applicant has not provided any evidence to show that the success is due to the claimed invention and not other market factors. The applicant argues that other market factors that could influence the sales of the product are speculation on the part of the Examiner and irrelevant to the commercial success are not substantiated by the evidence because the applicant has not shown that the commercial success is directly derived from the claimed product itself. Without a clear nexus showing the success is due to the towel as claimed the evidence is not sufficient to show commercial success.

Further, the Applicant could not provide information which would show the market share of the claimed towel, or even show how the towel did as compared to similar products. Thus, the sales information provided *only* represents the claimed towel as compared to the Applicant's other products. Thus, this is not sufficient evidence without the evidence as to the market share of the towel. Merely showing that there was commercial success of an article which embodied the invention is not sufficient. *Ex parte Remark*, 15 USPQ2d 1498, 1502-02 (Bd. Pat. App. & Inter. 1990). Could the sales be a result of outside companies removing products from the market or going out of business? Are the sales a result of

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the Applicant's own plans to push this one product to the exclusion of their other products? Is the amount of revenue generated by the claimed towel due to the product's mark-up price and not a direct indicator of the products successfulness? How did the price of the towels influence their sales versus the other towels. Sales figures are not just solely due to the product by itself, but the market as a whole, marketing of the product, pricing of the product and supply of the product. The evidence provided by the applicant fails to address any of these questions. Therefore, the evidence provided by the Applicant does not provide a good perspective of how the product has done in the market as a whole or compared to similar products sold by competitors, or how the sales are influenced by their own production and marketing plans. Therefore, one cannot reasonably tell what factors caused the increased sales of the presently claimed product.

Further, with respect to the applicant's evidence of copying, as set forth in § MPEP 716.06, more than the mere fact of copying is necessary to make that action significant because copying may be attributable to other factors (see §MPEP 716.06). Alleged copying is not persuasive of nonobviousness when the other manufacturer had not expended great effort to develop its own solution. *Pentec, Inc. v. Graphic Controls Corp.*, 776 F.2d 309, 227 USPQ 766 (Fed. Cir. 1985).

Further, with regard to the declaration showing long felt need (Appeal Brief, page 22), the applicant relies on the commercial success of the product. However, as set forth above the commercial success has not been shown to be a result of selling the claim towel as opposed marketing, pricing, or production of the products which had a stronger influence on the sales of the towels. Establishing long-felt need *requires* objective evidence that an art recognized problem existed in the art for a long period of time without solution (see §MPEP 716.04). The applicant provided no evidence to show this was in fact a problem than was recognized in the art or that others had been trying to solve the same problem unsuccessfully. The evidence that the towel was copied by others does not show that they were trying to solve an art recognized problem or that the problem existed for an extended period of time. Thus, the declarations are not sufficient to overcome the art rejections.

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**(11) Related Proceeding(s) Appendix**

Copies of the court or Board decision(s) identified in the Related Appeals and Interferences section of this examiner's answer are provided with the Appeal Brief filed by the applicant on November 5, 2008 (Related Proceeding Appendix).

For the above reasons, it is believed that the rejections should be sustained.

Respectfully submitted,

/Jenna-Leigh Johnson/

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